Supreme Court, U. S.
FILED
APR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

79-1645

No. .....
(undocketed)

MARTIN B. CANTER,

Petitioner,

vs.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT and THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondents.

UNITED STATES OF AMERICA,

Real Party in Interest.

[Cases below: USCA 9 No. 77-3442; USDC (Central District of California) CR-76-994-RJK.]

PETITION FOR WRIT OF MANDATE, OR IN THE ALTERNATIVE, A PETITION FOR A COMMON LAW WRIT OF CERTIORARI AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

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IN THE

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PETITION FOR WRIT OF MANDATE, OR IN THE ALTERNATIVE, A PETITION FOR A COMMON LAW WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of petitioner, Martin B. Canter, for a Writ of Mandate, or in the alternative, for a Common Law Writ of Certiorari, directed alternatively to the United States Court of Appeals for the Ninth Circuit or the United States District Court for the Central District of California, respectfully alleges:

1. There are no official or unofficial reports of the opinions delivered in the courts below.

2. Jurisdiction of this Court is sought to be invoked under 28 U.S.C. § 1651(a).

3. On or about August 2, 1976 an indictment was returned against petitioner in the respondent United States District Court for the Central District of California, in which petitioner and a co-defendant were charged with conspiracy (18 U.S.C. § 371) to violate 18 U.S.C. § 1001. This charge was contained in Count One of a multiple count indictment.

4. On June 20, 1977 petitioner pled guilty to Count One of the indictment.

5. On September 12, 1977, and before sentence was pronounced, petitioner, through counsel, filed a Motion in Arrest of Judgment pursuant to Rule 34 of the Federal Rules of Criminal Procedure. The gravamen of the motion was that the respondent District Court was without jurisdiction to impose any imprisonment, fine, probation or other penalty upon petitioner for violating 18 U.S.C. §§ 371 and 1001 in that the court was deprived of such jurisdiction by reason of the provisions of 31 U.S.C. § 231—a specific statute which controlled the conduct of petitioner and superseded the general provisions of 18 U.S.C. § 1001. Petitioner's Motion in Arrest of Judgment was denied by the respondent District Court on the date it was filed. Thereafter, petitioner was

sentenced to three years' imprisonment and ordered to pay a fine of $10,000. The execution of the sentence as to imprisonment was suspended and petitioner was placed on probation for a period of three years. Respondent District Court granted a stay of execution on the payment of the fine until January 10, 1978.

6. On September 20, 1977 petitioner timely filed his Notice of Appeal.[1] Thereafter, petitioner filed a Motion for Stay of Execution Pending Appeal. On January 12, 1978 respondent Circuit Court ordered petitioner to deposit in the Registry of respondent District Court the sum of $10,000 (the amount of the fine imposed by respondent District Court as a condition of probation). The Motion for Stay of Execution of the remaining term of the sentence was denied.

7. On June 6, 1978, after briefs had been filed by the parties, respondent Circuit Court issued a Memorandum in which the court, after delineating the nature of petitioner's contentions on appeal, stated:

> "It is well established that the same act can give rise to both civil and criminal liability. Therefore, the existence of the civil sanction does not affect the application of a criminal one. *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943). Moreover, this conviction and the sentence imposed pursuant to it are for conspiracy under 18 U.S.C. § 371, which has elements different from the substantive offense under 18 U.S.C. §§ 1001, 1002.
>
> "This appeal is frivolous. The mandate shall issue

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[1]Petitioner's appeal in respondent Circuit Court was given the number 77-3442.

forthwith. No petition for rehearing shall be entertained."

(A copy of the Circuit Court's Memorandum is attached hereto as Appendix "A".)

8. On July 21, 1978 petitioner filed in respondent Circuit Court a Petition (Motion) to Recall Mandate and to Strike Void Order from Memorandum Opinion. In this petition, petitioner sought an order of respondent Circuit Court recalling its mandate and, in support of his petition, argued in pertinent part as follows:

> "In sum, although the Court misconstrued the authorities cited by the Appellant and incorrectly disposed of a meritorious claim, the Court has precluded the Appellant from seeking further review. The order of the Court refusing to permit a petition for rehearing was made without statutory or constitutional authority and deprived this Appellant of his right to full and complete appellate review. It is therefore essential that the mandate be recalled, the void order stricken and a time set for filing a petition for rehearing." (Petition [Motion] to Recall Mandate and Strike Void Order from Memorandum Opinion, p. 3.)

9. On August 23, 1978 respondent Circuit Court issued the following order:

> "The Opinion of the court dated June 6, 1978 is amended by deleting therefrom the last sentence, 'No petition for rehearing shall be entertained.'
>
> "The petition to recall mandate filed herein on July 21, 1978 is deemed to be a petition for rehearing, timely filed. That petition is denied."

(A copy of this Order is attached hereto as Appendix "B".)

10. On September 7, 1978 petitioner filed a Motion for Reconsideration; for Leave to File Petition for Rehearing and Suggestion for Hearing In Banc. In this motion petitioner, after summarizing the pertinent events which preceded the filing of the motion, noted that "[a]s a result of the various orders of this Court, therefore, the Appellant has never had the opportunity to present to this Court a suggestion for rehearing in banc pursuant to Rule 36(c)." (Motion for Reconsideration; for Leave to File Petition for Rehearing and Suggestion for Hearing In Banc, p. 2.)

11. On December 3, 1979 respondent Circuit Court issued the following order:

> "It appearing that the mandate has not issued in this case, the court makes the following order:
>
> "On or before fourteen (14) days after filing of this order, the appellant may file either or both a further petition for rehearing or a suggestion for rehearing en banc."

(A copy of this Order is attached hereto as Appendix "C".)

12. The order issued by respondent Circuit Court quoted above was based on the erroneous premise that "mandate has not issued in this case." In fact, because respondent Circuit Court had taken no action with respect to the mandate, the mandate of respondent Circuit Court was spread before the respondent District Court on July 10, 1978.

13. On January 17, 1980 petitioner filed in respondent Circuit Court a Petition to Recall Mandate. In this peti-

tion, petitioner pointed out the erroneous premise upon which respondent Circuit Court's December 3, 1979 order was based and requested the following relief:

> "It is therefore respectfully submitted that the Court should act upon the original petition to recall the mandate, or the instant petition to recall the mandate, and recall the mandate, authorize a petition for rehearing and suggestion for rehearing en banc to be filed." (Petition to Recall Mandate, p. 3.)

14. On February 11, 1980 respondent Circuit Court denied petitioner's last filed Petition to Recall Mandate. (A copy of this Order is attached hereto as Appendix "D".)

15. Respondent Circuit Court has proceeded without, and in excess of, its jurisdiction and has abused its discretion to the substantial prejudice of petitioner in that the combined effect of the orders of respondent Circuit Court referred to above has been to deny to petitioner the right to petition respondent Circuit Court for a rehearing and/or to suggest a rehearing en banc.

16. Respondent District Court has proceeded without, and in excess of, its jurisdiction and has abused its discretion to the substantial prejudice of petitioner in that respondent District Court has refused to vacate and set aside its void judgment referred to above.

17. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, other than to petition this Honorable Court for a Writ of Mandate, or in the alternative for a Common Law Writ of Certiorari, in that if this Court refuses to issue a Writ of Mandate or, alternatively, a Common Law Writ of Certiorari petitioner will

be forever barred from (a) having respondent Circuit Court reconsider its decision rendered in Case No. 77-3442 and/or (b) suggesting a rehearing en banc, and will remain a convicted felon even though his conviction is void and should be set aside.

WHEREFORE, petitioner prays for judgment as follows:

1. For the issuance of a Writ of Mandate, or in the alternative for a Common Law Writ of Certiorari,

(a) Commanding respondent Circuit Court to recall its previously issued mandate in Case No. 77-3442 and further commanding respondent Circuit Court to reconsider its previously rendered decision on the merits in Case No. 77-3442 or to afford to petitioner a reasonable time within which to submit to respondent Circuit Court a suggestion for hearing en banc, or

(b) Commanding respondent District Court to issue an order vacating and setting aside its void judgment in Case No. 76-994-RJK, the case which gave rise to the appeal to respondent Circuit Court in Case No.77-3442.

2. For such other and further relief as to the Court seems just and proper.

Respectfully submitted,

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POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE, OR IN THE ALTERNATIVE, A PETITION FOR A COMMON LAW WRIT OF CERTIORARI

Indictment No. 76-994 was filed before the United States District Court for the Central District of California on August 2, 1976 (CT 1)[1]. Although the indictment was in numerous counts, the petitioner, Martin B. Canter, was named only in Count One, charging a conspiracy, pursuant to 18 U.S.C. § 371, to violate 18 U.S.C. §§ 1001 and 1002. The substance of the charge was that petitioner Canter, together with one Marion N. Gourley, agreed and conspired to make false writings and documents containing materially false statements which were to be submitted to the Veterans' Administration, an agency of the United States.

Ultimately, on June 20, 1977, petitioner Canter entered a plea of guilty to Count One. Petitioner appeared for sentencing on September 12, 1977. At that time, a motion brought by petitioner in arrest of judgment pursuant to Federal Rules of Crimin[illegible] Procedure, Rule 34, was denied by the court. (RT 45-46.)[2] Petitioner was thereafter sentenced to a term of imprisonment of three years and a fine of $10,000. The execution of sentence was suspended as to imprisonment, petitioner was placed on probation for a period of three years and was ordered to stand committed until the fine was paid or until discharged from custody in due course of law. (CT 27-28.)

A timely Notice of Appeal (CT 29) and Designation of Record on Appeal (CT 34) were filed, followed by the government's Counter Designation of Record on Appeal (CT 31).

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[1] CT refers to the Clerk's Transcript on Appeal.

[2] RT refers to the Reporter's Transcript of proceedings.

The Provisions Of 31 U.S.C. § 231 Are, Under The Allegations Of The Present Indictment, Specific Terms Which Prevail Over The General Terms Of 18 U.S.C. §§ 1001 And 1002 And Therefore Establish The Complete Extent Of The Liability Of This Petitioner For Such Acts As Are Alleged In The Indictment.

Petitioner, Martin B. Canter, presently stands convicted of a conspiracy to violate 18 U.S.C. §§ 1001 and 1002. The gravamen of the allegations in the indictment is to the effect that petitioner wilfully made or caused to be made false writings and documents containing materially false statements, which documents he submitted to the Veterans' Administration in support of the purchase of properties from such Administration. In support of his motion in arrest of judgment, petitioner attached the affidavit of Burton Marks which revealed that the government, at the time of sentencing, was asserting a claim against petitioner pursuant to 31 U.S.C. § 231, seeking double damages and the forfeiture value of the properties subject to the instant indictment. It is the contention of petitioner that the specific provisions of 31 U.S.C. § 231 control over the more general terms of 18 U.S.C. §§ 1001 and 1002 and thus limit the scope of liability for such acts as were charged in the indictment.

Section 231 applies to "any person not in the military or naval forces of the United States" who shall either "make or cause to be made, or present or cause to be presented, for payment or approval" to any official of the United States any "claim upon or against the Government of the United States, or any department or officer thereof" knowing the

claim to be false; or who "enters into any agreement, combination or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim . . . . "[3]

This section, which is entitled "Liability of Persons Making False Claims," provides that such persons as are described therein:

> " . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit . . . . "

In contrast, the more general provisions of 18 U.S.C. §§ 1001 and 1002 apply generally to falsification of documents "in any matter within the jurisdiction of any department or agency of the United States." Thus, the specific "liability" and penalty provisions of § 231 must control. As stated in *Fourco Glass Co. v. Transmirra Products Corporation*, 353 U.S. 222, 228-229, 77 S. Ct. 787, 791 (1957):

> "Specific terms prevail over the general in the same or another statute which otherwise might be controlling."

This general proposition was more fully explained by

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[3]The United States Court of Appeals in its Memorandum Opinion (Appendix "A") held: "Moreover, this conviction and the sentence imposed pursuant to it are for conspiracy under 18 U.S.C. § 371, which has elements different from the substantive offense under 18 U.S.C. §§ 1001, 1002." By the express wording of § 231 Congress intended civil penalties to apply to a person who conspired to violate that section. Compare the wording of 18 U.S.C. § 371, " . . . if two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose . . . . "

the Ninth Circuit Court of Appeals in *Monte Vista Lodge v. Guardian Life Insurance Company of America,* 384 F.2d 126, 129 (9th Cir. 1976), where the court stated:

> "A specific statutory provision will govern even though the general provisions, if standing alone, would include the same subject."

Consequently, the question is not whether the provisions of Title 18 could be considered applicable to petitioner's conduct but, rather, whether the provisions of Title 31 are more specifically applicable.

Several factors lend support to this argument, including the relevant statutory scheme and statutory history. Thus, for example, § 231, as originally enacted, read in part as follows:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'crimes' shall forfeit and pay to the United States . . . . "

The original codification, therefore, contemplated a penalty or forfeiture by direct reference to specific criminal activities. There was thus a demonstrable intent to make the civil penalties cumulative to the criminal liability. Thereafter, however, these specific prohibited acts of § 5438 were incorporated into § 231. Section 5438, the criminal liability section, was repealed by the Act of March 4, 1909, c. 321, § 341, 35 stat. 1153. Ultimately, those criminal penalties found their way into 18 U.S.C. §§ 287 and 1001, as *general* prohibition against false claims. In other words, the specific activities alleged in the instant indictment were apparently

purposely retained with regard to the § 231 penalties but were abrogated with regard to general criminal penalties. Furthermore, unlike many other penalty provisions, § 231 does not contain any proviso that the liability described there is "in addition to any and all other penalties imposed by law." Thus, in contrast to the great majority of statutes imposing such civil penalties, there is not a demonstrated intent to make the penalties of § 231 cumulative to any other civil or criminal penalties. Compare § 231, therefore, with 38 U.S.C. § 1822 which, prior to its repeal in 1974, dealt with the recovery of damages for a sale to a veteran of residential property for consideration in excess of its reasonable value. That section provided for the recovery of treble damages. Subsection (c) of § 1822 stated: "The remedy provided in this section shall be in addition to any and all other penalties imposed by law."

The predecessor of § 1822, 38 U.S.C. § 694, was considered by the Court of Appeals in *Karrell v. United States,* 181 F.2d 981 (9th Cir. 1950). In that case, as here, the court confronted the issue of the exclusivity of civil penalties. The court there found it necessary to rely specifically upon the provisions of then § 697 of Title 38 U.S.C. which *incorporated* the criminal penalty provisions of then § 715 of Title 38 U.S.C. No such incorporation section, however, exists in Chapter 6 of Title 31, which includes § 231.

The controlling nature of the penalties included in § 231 is further heightened by the penal nature of that provision. For example, 31 U.S.C. § 233 describes the "duty of the United States Attorney as to such cases." That section not only requires the United States Attorney

to cause an action to be commenced under § 232, but also provides that the person whose liability is described by § 232:

> " . . . may be *arrested* and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000 and twice the amount of damages sworn to in the affidavit of the person bringing the suit." (Emphasis added.)

It is thus apparent that Congress viewed § 231 as a bailable "offense," subjecting a suspect to "arrest," making the action prosecutable by the "United States Attorney" and thus making any liability imposed more clearly analogous to criminal liability than a mere civil penalty.

Of course, the inclusion of forfeiture and penalty provisions in such a statutory scheme, and the exclusion of other sorts of penal sanctions, including incarceration or probation, imply a legislative determination to not permit the exercise of such penal sanctions against this petitioner. As stated in *Continental Casualty Co. v. United States,* 314 U.S. 527, 533 (1941):

> "[A] legislative affirmative description implies denial of the non-described powers."

The entire thrust of § 231, therefore, is to provide both civil and "penal" sanctions for violation of its terms. The history of this section demonstrates an initial cumulative effect to criminal sanctions, which was thereafter followed by the adoption of those criminal terms as terms of the statute itself. This section consequently presents a specific and detailed prohibition against particular conduct with the possibility of civil and penal sections. It therefore necessarily controls over the more general terms of §§

1001 and 1002.

CONCLUSION

For the reasons cited above, it is respectfully submitted that the liability provisions of 31 U.S.C. § 231 specifically apply to the conduct of petitioner and thus prevail over the more general terms of 18 U.S.C. §§ 1001 and 1002. Accordingly, the United States Court of Appeals for the Ninth Circuit erred in concluding that the existence of the civil sanction did not affect the application of a criminal one. It is respectfully submitted, therefore, that a Writ of Mandate, or in the alternative a Common Law Writ of Certiorari, should issue to the Court of Appeals commanding it to recall its previously issued mandate, to reconsider its previously rendered decision on the merits, or to afford to petitioner a reasonable time to submit to the court a suggestion for hearing en banc. Alternatively, a writ should issue to the United States District Court for the Central District of California commanding it to vacate and set aside its void judgment in Case No. 76-994-RJK.

Respectfully submitted,

BURTON MARKS

Counsel for Petitioner

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APPENDIX "A"

MEMORANDUM OPINION

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARTIN B. CANTER, Defendant-Appellant.

No. 77-3442.

[Filed June 6, 1978]

Appeal from the United States District Court for the Central District of California

Before: MERRILL and KENNEDY, Circuit Judges, and BARTELS,* District Judge.

Appellant Martin B. Canter was convicted and sentenced for conspiracy, a violation of 18 U.S.C. § 371. He argues that submission of a false claim subjected him to civil liability under 31 U.S.C. § 231 and that therefore his conduct does not subject him to criminal liability, either under 18 U.S.C. §§ 1001, 1002, which specifically punish submission of false claims and possession of false papers with intent to defraud, or under the conspiracy statute.

It is well established that the same act can give rise to both civil and criminal liability. Therefore, the existence of the civil sanction does not affect the applicability of a criminal one. *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943). Moreover, this conviction and the sentence imposed

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*Honorable John R. Bartels, Senior United States District Judge for the Eastern District of New York, sitting by designation.

pursuant to it are for conspiracy under 18 U.S.C. § 371, which has elements different from the substantive offense under 18 U.S.C. §§ 1001, 1002.

This appeal is frivolous. The mandate shall issue forthwith. No petition for rehearing shall be entertained.

APPENDIX "B"

ORDER

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARTIN B. CANTER, Defendant-Appellant.

No. 77-3442.

[Filed August 23, 1978]

Appeal from the United States District Court for the Central District of California

Before: MERRILL and KENNEDY, Circuit Judges, and BARTELS,* District Judge.

The Opinion of the court dated June 6, 1978 is amended by deleting therefrom the last sentence stating, "No petition for rehearing shall be entertained."

The petition to recall mandate filed herein on July 21,

*Honorable John R. Bartels, Senior United States District Judge for the Eastern District of New York, sitting by designation.

1978 is deemed to be a petition for rehearing, timely filed. That petition is denied.

APPENDIX "C"

ORDER

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARTIN B. CANTER, Defendant-Appellant.

No. 77-3442.

[Filed December 3, 1979]

Before: MERRILL and KENNEDY, Circuit Judges, and BARTELS,* District Judge.

It appearing that the mandate has not issued in this case, the court makes the following order.

On or before fourteen (14) days after filing of this order, the appellant may file either or both a further petition for rehearing or a suggestion for rehearing en banc.

*Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

ORDER

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARTIN B. CANTER, Defendant-Appellant.

No. 77-3442.

[Filed February 11, 1980]

Before: MERRILL and KENNEDY, Circuit Judges, and BARTELS,* District Judge.

Upon due consideration, appellant's petition to recall the mandate is DENIED.

*Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on APRIL 15th 1980, I served the within PETITION FOR WRIT OF MANDATE, OR IN THE ALTERNATIVE, A PETITION FOR A COMMON LAW WRIT OF CERTIORARI and POINTS AND AUTHORITIES IN SUPPORT THEREOF (Canter vs. The United States Court of Appeals for the Ninth Circuit, et al.) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
7TH & MISSION STREETS
P. O. BOX 547
SAN FRANCISCO, CA. 94101
1 Copy - Ref. 77-3442

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DIST. OF CALIF.
312 NORTH SPRING STREET
U. S. COURTHOUSE
LOS ANGELES, CA. 90012
1 Copy - Ref. CR-76-994-RJk

SOLICITOR GENERAL OF THE
UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530
3 Copies

UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIF.
312 NORTH SPRING STREET
U. S. COURTHOUSE
LOS ANGELES, CA. 90012
3 Copies

I declare under penalty of perjury that the foregoing is true and correct.

Executed at HUNTINGTON BEACH, CALIFORNIA, on APRIL 15th 1980.

D. A. Standefer

41 Copies of Application for Leave to File and 41 copies of aforesaid Petition lodged concurrently – docket fee attached to original copy of Petition.

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161